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IN THE

Supreme Court of the United States

..... Term, 1978

No. 78-1096

JOSEPH A. SORBARA and
T. PETER HOMITZ,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioners, Joseph A. Sorbara and T. Peter Homitz, respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit in the above-captioned case.

OPINIONS BELOW

The district court's memorandum opinion dated April 11, 1978 is not reported but is set forth herein at Appendix A.

The court of appeals' judgment orders dated November 20, 1978, affirming the district court's judgments of conviction, are not yet reported but are set forth herein at Appendix B. The court of appeals' order dated December 12, 1978, denying the petition for rehearing, is not yet reported but is set forth herein at Appendix C.

JURISDICTION

The judgment orders affirming Petitioners' convictions were issued on November 20, 1978 by the court of appeals. A timely petition for rehearing *en banc* was denied on December 12, 1978, and the within petition for a writ of certiorari is being filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether there can be a violation of 18 U.S.C. §664, "Theft or embezzlement from employee benefit Plan", when the benefit plan does not establish an absolute property right to the funds allegedly embezzled but only demonstrates a claim?

II. Whether petitioners were denied a fair trial when the trial court in its charge failed to distinguish between the appropriate standard for evaluating character testimony concerning the trait involved in the crime (honesty) and character testimony concerning the trait not involved in the crime (credibility)?

III. Whether the admission of evidence in regards to an unrelated loan, debt and labor dispute was so irrelevant, collateral and prejudicial that petitioners were deprived of a fair trial?

STATUTORY PROVISIONS INVOLVED

§664. THEFT OR EMBEZZLEMENT FROM EMPLOYEE BENEFIT PLAN

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

Added Pub.L. 87-420, § 17(a), Mar. 20, 1962, 76 Stat. 41, and amended Pub.L. 93-406, Title I, § 111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.

STATEMENT OF THE CASE

History

On July 6, 1977, petitioners Joseph A. Sorbara and T. Peter Homitz were indicted at criminal number 77-159 in the United States District Court for the Western District of Pennsylvania. The five (5) count indictment charged them with violations of 18 U.S.C. §§2, 371, 664, 1951 and 1954.

Specifically, count one (1) charged that from November, 1975 to April, 1976, Sorbara and Homitz conspired to embezzle, steal and convert premiums, credits, claims and other assets belonging to the Retail Store Employees Local 1407 and Subscribing Employers Health and Welfare Trust Fund (the Fund) to their own and others' use in violation of 18 U.S.C. §371. Count three (3) charged that on January 23, 1976, Sorbara and Homitz did embezzle, steal and convert to their own use and the use of others the sum of $9,232.29 of the monies, funds, premiums, credits, claims and other assets of the Fund in violation of 18 U.S.C. §§2 and 664. Counts two (2), four (4) and five (5) were dismissed at trial following motions for judgment of acquittal.

On November 23, 1977, a jury trial was convened before the Honorable Barron P. McCune, District Judge. On December 2, 1977, the jury returned verdicts of guilty on both counts one (1) and three (3) of the indictment against both Sorbara and Homitz.

Post-trial motions for a new trial, judgment of acquittal and in arrest of judgment were filed. On April 11, 1978, said motions were denied by Judge McCune who issued a Memorandum opinion in support of his order.

On April 27, 1978, both Sorbara and Homitz were sentenced as to count one (1) to imprisonment for a period of two and one-half (2½) years and to pay a fine of $5,000.00. As to count two (2), the same sentence of imprisonment, to run concurrently, was imposed; there was no additional fine.

The judgments of sentence were affirmed by the United States Court of Appeals for the Third Circuit on November 20, 1978. A petition for rehearing was denied on December 12, 1978. The within Petition For Writ Of Certiorari follows.

Facts

In 1972, the Health and Welfare Fund (the Fund) of Local 1407, Retail Store Employees Union, contracted with Vision Service Associates (VSA) for prepaid vision care for union members. The contract provided that VSA was to return to the Fund 75% of the excess premiums when the contract expired. As the expiration date neared in 1975, Dr. Hanna, VSA's public information director, advised Irene Murrman, the benefits manager of the Fund, that 100% of the surplus premiums might be returned. Murrman discussed this possibility with Joseph Sorbara, president of Local 1407 and chairman of the board of trustees of the Fund.

In September, 1975, the office staff of Local 1407, who were members of Local 33, Office and Professional Employees Union, voted to strike. Their business agent was T. Peter Homitz, who was also the VSA sales representative who had sold Local 1407 the vision care plan. The strike by Local 33 was never authorized, and the strikers subsequently lost their jobs.

On January 23, 1976, Sorbara and Homitz came to VSA and went to the office of Dr. T. Lewis Soles, executive director of VSA. Shortly thereafter, Soles called Frank R. Michael into his office, introduced him to Sorbara, and left. Michael had been appointed to replace Soles several months earlier, and the period of transition was characterized by indecisive leadership and financial problems. Michael was, for the most part, unfamiliar with the Local 1407 contract; he was aware that there were problems, but he had never met Sorbara and was surprised by their (Sorbara and Homitz's) visit. According to Michael, Sorbara felt that it was unfair that the Health and Welfare Fund was to have returned to it only 75% of the excess premiums while most of the other unions which had contracts with VSA were receiving 100% refunds. Michael testified that VSA had been notified by the Pennsylvania Insurance Department that 100% refunds were unacceptable; he explained to Sorbara that VSA was in financial trouble and that a 100% refund would cause a serious depletion of reserves. A compromise was quickly reached: the Fund would receive an additional 15%, and VSA would retain 10% of the excess premiums. It was agreed that two checks would be prepared—one for a payment on the 75% due, the other for the 15% compromise.

According to Michael, Sorbara then asked that the check for the additional 15% be made out to Homitz. Michael disagreed; this would leave no record that a compromise had been reached. Sorbara told Michael of his influence with other labor leaders, and that the Fund's contract with VSA could be jeopardized. At this point, Michael left the office to speak with Dr. Soles, who agreed that the check should not be made out to Homitz. Michael then went to the bookkeeper, Mary

Ellen Bernhardy, to find out how much money was in the account. Bernhardy calculated the amounts due the Fund. The total surplus was $61,549.20; 75% of that total was $46,161.90. A check to the Fund was to be drawn for $26,161.90, leaving a balance of $20,000. Bernhardy also calculated that 15% of the surplus was $9,232.29. Michael told her that "Mr. Sorbara was asking that the 15 per cent check be drawn to Mr. Homitz, but that this was very much up in the air". Michael left Miss Bernhardy and found Dr. Soles outside his office. While discussing the problem with Soles, Miss Bernhardy brought the checks in. One was made payable to the Fund in the amount of $26,161.90; the other was made payable to Homitz in the amount of $9,232.29. Soles signed them, commenting to Michael that, "We'll both have to witness what is going on here", and the checks were given to Sorbara and Homitz. The checks were drawn on the VSA Transfer Account, which was used to pay doctor and lab fees as well as premium funds. It was not used to pay commissions, although testimony at trial gave the impression that VSA was, in Michael's words, "run more or less like a candy store".

Sorbara testified that he and Homitz had gone to VSA to clear up a disagreement about the contract. Homitz also mentioned that VSA owed him some money. Sorbara said that he was unaware of the 75-25 division of excess premiums provided for in the contract, but that when Michael showed him the contract, he agreed that the Fund was only entitled to 75%. He said that this was the extent of his business with Michael, and that he had no knowledge of the Homitz check.

Homitz testified that the check represented a settlement of the amount VSA owed him for sales commis-

sions. He had not known that VSA was keeping 25% of the excess premiums from the Fund account, and he convinced VSA that he was entitled to a larger commission because VSA was making more money from the account.

REASONS FOR GRANTING THE WRIT

I.

There cannot be a violation of 18 U.S.C. §664, "Theft or embezzlement from employee benefit plan" when the benefit plan does not establish an absolute property right to the funds allegedly embezzled but only demonstrates a claim.

It is axiomatic that ". . . [t]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". *In Re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Here, it is Sorbara and Homitz's position that they were convicted of the crimes alleged in the indictment without proof of each fact necessary to constitute those particular offenses.

Count one (1) of the indictment alleges a conspiracy to violate 18 U.S.C. §664[1], while count three (3)

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1. §664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

alleges a substantive violation of the same statute. In these counts, it is alleged that Sorbara and Homitz conspired to and did embezzle, steal and unlawfully and wilfully convert to their own use and the use of others the sum of $9,232.29 of the monies, funds, premiums, credits, claims and other assets of Local 1407 and the Health and Welfare Trust Fund. Under the statute and the specific allegations of the instant indictment, it is clear that an essential element of the offense is that the sum of $9,232.29 belonged to and was the property of the union's Fund. Sorbara and Homitz contend that the government failed to establish this essential element. In other words, there is not sufficient evidence to prove beyond a reasonable doubt that the Fund had the absolute property rights to the $9,232.29 check issued by VSA to Homitz.

Support for this position is found in the language of the statute, 18 U.S.C. §664, which sets forth the items or property rights subject to embezzlement. They are enumerated as follows:

> ". . . any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith . . ."

It is submitted that all of the above items require a finding that in fact the plan or fund owned or possessed an absolute property right in the thing allegedly embezzled.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

Added Pub.L. 87-420, §17(a), Mar. 20, 1962, 76 Stat. 41, and amended Pub.L. 93-406, Title I, §111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.

As will be developed *infra,* the government has added a new item heretofore not enumerated in §664, i.e., the embezzlement of a "disputed claim" or "claim" of a fund. Therefore, before any analysis of the evidence is undertaken, it is necessary to review case law regarding the issue of property rights.

Of substantial value in any analysis of this issue is the case of *United States v. DeLillo,* 421 F.Supp. 1012 (E.D.N.Y. 1976), which also involved an indictment under 18 U.S.C. §664. There, a fund under §664 had sold a certain resort complex which it owned to an entity of which DeLillo was president. The purchase price by contract was $18,800,000.00, of which $15,300,000.00 was paid to the fund. As to the balance of $3,500,000.00, DeLillo was to use it to discharge approximately $2,500,000.00 in debts previously incurred by the fund in the resort complex construction. However, DeLillo used $1,500,000.00 of the money in a manner inconsistent with the contract of sale and was indicted for violation of §664. DeLillo moved for dismissal of the indictment on the basis that the $3,500,000.00 did not constitute property of the fund. The district court granted the motion.

In dismissing the indictment, the court noted that money did not constitute "property" of the fund within the meaning of §664. 421 F.Supp. at 1014. The court said specifically:

> "*No provision in the contract* granted the Union Fund the right to receive *any part* of the $3,500,000.00, even if the entire amount was not ultimately needed to satisfy fully the obligations for which it was designated." (Emphasis added.) 421 F.Supp. 1013. See also footnote 2.

Certainly the $3,500,000.00 was a portion of the sale price and was to be used to pay debts of the fund. Moreover, the failure to pay the debts would continue liability in the fund. However, the court in a proper analysis concluded that the fund by contract and law had no legal, equitable or possessory interest in the money. Stated simply, there was no "ownership" rights of the fund in the money. The *DeLillo* case parallels the instant case to a great degree. Not only was there a contract governing disposition of the money, but also a civil action had been brought regarding disposition of the money. Unlike *DeLillo,* however, it cannot be argued in the instant case that the 25% was ever money in which the fund could claim any legal interest.

The court in *DeLillo* is consistent with *United States v. Achilli,* 234 F.2d 797 (7th Cir., 1956), wherein the court states as to embezzlement:

> "A necessary element of the crime of embezzlement is the existence of *an absolute property right* in someone other than the alleged embezzler." (Emphasis added.)

Moreover, in *United States v. Collins,* 464 F.2d 1163 (9th Cir., 1972), which is cited by *DeLillo,* the court in deciding an alleged embezzlement under 18 U.S.C. §641 stated that an essential element of embezzlement is that the person from whom the property is allegedly embezzled suffers an actual loss. Thus, to sustain a conviction in the instant case, an absolute property right in the money at issue must be found in the Fund to the total exclusion of Homitz, and the Fund must be found to have suffered an actual loss.

The indictment itself in the case at bar reflects the inherent weakness and lack of property interest

of the Fund in the money at issue. As noted previously, §664 enumerates certain items subject to embezzlement. In this indictment, the government has added a new item not specified by Congress, that being a "claim". The indictment as a whole uses the word "claims" six (6) times to describe the amount allegedly embezzled. For example, count one (1), in an attempt to track the statute, states that Sorbara and Homitz conspired to "embezzle, steal, and convert premiums, credits, *claims,* and other assets" of the Fund. In fact, the check made payable to Homitz is referred to as a compromise of "the *disputed* twenty-five percent *claim*". The term "claim" was later repeatedly used by the government in closing argument to the jury in describing the amount allegedly embezzled. It is submitted that if Congress intended that "claims" and "disputed claims" could be the subject of embezzlement, the term would have been added to the statute. It is further urged that good reason existed and now exists for not adding such a term. If a "claim" can be the subject of an embezzlement then any person who yields his claim to either the person from whom it is claimed or to other claimants would risk prosecution. Traditionally, "claims" have been the province of civil litigation as was for example the matter in *DeLillo*. We now find, however, that "claims" are the subject not only of criminal determination but of embezzlement. What then in the face of the statute, case law and the indictment does the record as a whole reveal in a light most favorable to the government?

V.S.A. and the Fund entered into a contract from March 1, 1972 to March 1, 1975 (extended to July 1, 1975) wherein by its specific terms 75% of any excess

over expenses was to be returned within 60 days after expiration to the Fund. The contract by its express terms placed title and ownership of the remaining 25% in V.S.A. and not the Fund. The contract further provides that all modifications thereof must be in writing and that any oral representations are ineffective. V.S.A. did not pay any portion of the 75% when due by the contract. The Fund Benefit Manager, Mrs. Murrman, at first believed the Fund was entitled to a 100% return notwithstanding the contract but admitted that she later realized that the Fund was entitled to only 75%. There were inquiries from Mrs. Murrman about whether the Fund had any right to any amount in excess of 75% of the excess over expenses. By January 23, 1976, V.S.A. had not paid any of the 75% due the Fund. On January 23, 1976, Sorbara and Homitz together visited V.S.A. by arrangement with Dr. Soles to discuss the delinquency. Homitz was a salesman and broker employed by V.S.A. Doctor Soles testified that Homitz was required to be at the meeting as the servicing agent of V.S.A. Homitz had on several occasions upon visiting V.S.A. complained of moneys due him and V.S.A. had a history of being in arrears with Homitz. V.S.A. had a few months prior to January, 1976, attempted to unilaterally cancel an oral contract of employment with Homitz concerning a weekly payment plus expenses for the solicitation of new business. It is acknowledged that V.S.A. owed Homitz some money uncertain in amount on January 23, 1976. Upon meeting Michael, the successor to Soles, Sorbara asked about the disposition of the amounts in excess of 75% under the contract. Michael offered 90% to settle the matter. Sorbara then requested that a check for 15% be drawn to Homitz. Michael did not direct anyone at V.S.A. to,

in fact, draw such a check, but such a check was drawn through a misunderstanding by the bookkeeper. Someone placed separate checks to the Fund and to Homitz in envelopes, and someone handed the envelopes to each respective defendant. The bookkeeper of V.S.A. continued to carry on her accounts the sum due the Fund as 75% of the excess. The Fund has received the full 75% called for in the contract plus interest.

It is submitted that from the above analysis alone the best that can be argued even in a civil matter is that it is unclear as to who had an absolute property right in the 15%. The testimony that no direction was given to draw the check to Homitz and that the subsequent drawing of the same was a misunderstanding by the bookkeeper, points directly to the insufficiency of the evidence regarding the ownership issue.

It should also be noted that Homitz was not a stranger to V.S.A. but was in their employ. It certainly cannot be argued, therefore, that payment alone to Homitz raises the inference that Homitz had no right, ownership, claim or interest in the money he received. Such an inference would be proper if, of course, Homitz had been some total stranger that Sorbara had brought to the meeting. Yet this case stands void of any evidence by the government that Homitz was not entitled to monies.

Truly this is a unique case, but this does not allow disregard for the fundamental principle that criminal statutes are to be strictly construed. *Yates v. United States,* 354 U.S. 298, 310, 77 S.Ct. 1064, 1072 (1957). It is submitted that the government's theory is not supported by statute or case law, and there is no reason to broaden legislatively defined crimes to encompass

"claims" not contemplated or so governed. The instant case presents a set of facts that do not even rise to the level of *DeLillo* as to ownership or property rights in the money.

II.

The trial court did not instruct the jury as to the appropriate standard by which to evaluate reputation evidence concerning those traits involved in the crimes alleged.

Sorbara and Homitz contend that the above issue is cognizable under the plain error doctrine even though there was a failure to object since "it is settled that an appellate court will take notice of 'plain error' in spite of lack of proper objection below". *United States v. Gray,* 468 F.2d 257, 261 (3rd Cir., 1972); Rule 52(b), Federal Rules of Criminal Procedure.

During the trial below, both Sorbara and Homitz presented testimony concerning their excellent reputations for truthfulness, honesty and being law-abiding citizens. In his instructions to the jury, the trial court set forth the standards by which to evaluate this testimony in the following manner:

> "The Defendants have both introduced character witnesses to speak of their good character for truthfulness and as law-abiding people. So I must speak for a moment about character evidence. Evidence of good reputation is to be considered by the jury along with all the other evidence in the case. And if all of the evidence considered together creates a reasonable doubt in your mind that the Defendants are guilty, they should be acquitted. Reputation evidence is offered not simply to raise a reasonable

doubt, but to establish innocence. And if you conclude that the Defendants bore a good reputation for truth and veracity in regard to the law, you should regard it as a fact like any other fact tending to show innccence. Reputation evidence is what we call substantive evidence to be weighed with all of the other evidence. If it is believed, it may of itself create a reasonable doubt. You must, therefore, decide whether to accept the testimony as to good reputation, and whether it points to innocence or whether it raise a reasonable doubt in your mind that such a man or such men would be likely or unlikely to commit offenses of the nature charged here.

But if the Government had shown beyond a reasonable doubt that the Defendants are guilty, even though they may bear a good reputation, they should not be acquitted simply because they bear a good reputation. The issue, I repeat, is one of credibility. . . ."

Sorbara and Homitz contend that this instruction was "plain error".

It is first noted that the character trait of truthfulness is not the specific trait involved in the crimes alleged. It is thus pertinent only to credibility. However, the trial court's instruction that "the issue . . . is one of credibility" ignores the fact that both Sorbara and Homitz presented testimony concerning good reputations for honesty and being law-abiding citizens. Evidence of those traits is substantive since they are involved in the crime alleged.

In this light, it is submitted that the court's instructions were erroneous because they were incomplete. Being substantive, those two traits deserved a clear explanation that proof of same may be such as to raise a reasonable doubt as to guilt.

Additional explanation is needed so the jury is not confused as to the proper standard for evaluating this reputation evidence. As the instructions stand, a juror might feel he or she must believe the reputation evidence beyond a reasonable doubt before a verdict of acquittal could be returned. To alleviate this misunderstanding, the jury should be instructed that the substantive evidence of good reputation concerning the character traits involved in the crime need only be proven by a fair preponderance of the evidence in order to raise a reasonable doubt.

In short, Sorbara and Homitz analogize the issue presented here to that decided by this Court in *Cool v. United States,* 409 U.S. 100, 93 S.Ct. 354 (1972). There, accomplice testimony was presented by the government, but it was largely exculpatory. The Court held that the exculpatory testimony of an accomplice need only be proven by a fair preponderance of the evidence in order to raise a reasonable doubt.

III.

The admission of certain irrelevant, collateral and prejudicial evidence deprived Petitioners of a fair trial.

The government's theory of the case was that Sorbara had a motive to do a favor for Homitz. Evidence was presented to show that Homitz was in debt to the credit union operated by Local 1407, and Sorbara knew it. Evidence was also presented to attempt to establish that Sorbara believed Homitz had aided him in removing Local 33 members from the office staff at Local 1407 headquarters. Sorbara and Homitz contend that by admitting this evidence the lower court erred since the evidence was irrelevant, collateral and prejudicial and had the effect of depriving them of a fair trial.

In regard to Homitz's debt to Local 1407's credit union, the government offered this testimony in order to prove Homitz had a need for money to pay this debt. However, it is uncontroverted that after Homitz received the check on January 23, 1976, no payment was made by him or anyone else to the credit union. By the government's own evidence, the proposed rationale/motive for Homitz receiving the money falls. The matter of the Homitz loan from the Union National Bank in Bridgeville is equally irrelevant. No justifiable, material inference can arise from the fact that Homitz merely listed Sorbara as a reference on the loan application. Sorbara was in no position to benefit from the granting of the loan or its repayment.

Concerning the strike, it was argued by the government that Homitz allowed certain things to happen during the course of the labor dispute so that Sorbara could replace the striking Local 33 members who made up his office staff. The government asserted that

Homitz's inaction resulted in the striking being illegal. However, there was no evidence presented to justify such characterization. The strike was a lawful economic strike which ensued at the expiration of a collective bargaining agreement. The failure to obtain strike benefits did not change this.

Prejudice to Sorbara and Homitz is also clear from the standpoint that the "illegal" strike was not recited in the indictment as an element of a substantive offense or an overt act in furtherance of the conspiracy. Consequently, to the jury, it no doubt appeared as evidence of additional illegality. As such, it was improper as evidence of "other crimes". Furthermore, it resulted in an impermissible broadening of the indictment. *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781 (1887); *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270 (1960).

CONCLUSION

For the reasons discussed above, petitioners request a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

THOMAS A. LIVINGSTON
IRVING M. GREEN

Attorneys for Petitioners

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
vs.
JOSEPH A. SORBARA
THEODORE PETER HOMITZ

Criminal Action No. 77-159

Memorandum

BARRON P. MCCUNE, District Judge
April 11, 1978.

Defendants, Joseph A. Sorbara and Theodore Homitz, have moved for judgment of acquittal and a new trial subsequent to their trial and conviction for violation of 18 U.S.C. §664. Their motions are based first on an interpretation of §664, and second, upon porportedly prejudicial evidence admitted during trial to prove motive. Both these argument are unpersuasive, thus we deny defendants' motions.

I

Sorbara and Homitz were fund guilty of conspiring to violate and of violating 18 U.S.C. §664, which provides:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets or any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than

$10,000, or imprisoned not more than five years, or both.

"As used in this section, the term 'any employee welfare benefit plan or employee pension benefit plan' means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974."

They now argue that the funds which were the subject of this conviction were not assets of the Retail Store Employees' Local 1407 and Subscribing Employers Health and Welfare Fund (the Fund). If these funds were not the property of the Fund, conviction under §664 would be improper.

To assess defendants' claim, it is necessary that the evidence adduced at trial be reviewed. In so doing, of course, the evidence must be viewed in manner most favorable to the Government, *Glasser v. United States,* 315 U.S. 60 (1942), and all reasonable inferences in favor of the Government must be deemed established. *United States v. Boyle,* 402 F.2d 757 (3d Cir. 1968).

Joseph Sorbara was, at all times pertinent to this action, President of Retail Store Employee's Local 1407 (Local 1407) and a Trustee of the Fund. In this dual capacity, Sorbara contracted with Vision Services Associates (VSA) to provide optometric services to the members of Local 1407.[1] This service was sold to Sorbara by Peter Homitz, a salesman of VSA who was also the President of the union representing the office workers in Local 1407's employ. Under the terms of the agreement between the Fund and VSA, the Fund was to pay a set premium for stipulated services to VSA. If the use of VSA services by the members of Local 1407 did not consume the premium, 75% of the excess premium was to be returned to the Fund.

1. As part of the contractual fringe benefits negotiated by Local 1407, various employers paid the Health and Welfare Fund money which the fund administered for the benefit of union members. One of the benefits was eye care, mainly the furnishing of glasses which VSA furnished under a contract with the fund.

At some time during the period the contract was in force in 1975, a dispute arose between the Fund and VSA as to the amount of excess premiums due to the Fund. The Fund claimed that all excess premiums should be returned to it, not just 75% of the premiums. VSA claimed 25% of these premium excesses were due it under the contract. Negotiations ensued. A conference occurred where Sorbara and Homitz discussed the dispute with Michael, representing VSA, at VSA offices. According to Michael a compromise was finally reached in which VSA agreed to pay to the Fund an additional 15% of excess premiums. This additional payment was calculated to be $9,232.29. According to Michael, Sorbara, having reached agreement, then directed that the check be made payable to Homitz. According to Sorbara and Homitz, there was no compromise. Sorbara testified that when the agreement was explained to him he conceded that the Fund had no claim. Thereupon Homitz demanded that certain commissions due him from VSA be paid and the check was made to Homitz for commissions. The jury did not believe Sorbara and Homitz. The payment by VSA to Homitz, the Government contends, was made at the insistence of Sorbara and is a violation of §664. Michael testified that he acceded to Sorbara's demand because Sorbara threatened to take away the business if his instructions were not followed.

Defendants argue that the money paid Homitz by VSA was not the property of the fund, but was a disputed claim to which the fund had no legal property interest. Because of this lack of any legal interest, the defendants urge that the transfer of these funds to Homitz was not a violation of §664. The jury, of course, has accepted Michael's testimony that during the meeting the dispute between VSA and the Fund was discussed and compromised and that the money belonged to the Fund and was diverted to Homitz at the insistence of Sorbara.

Defendants rest their argument on *U.S. v. DiLillo*, 421 F. Supp. 1012 (E.D. N.Y. 1976). *DiLillo* is not, however, as defendants urge, strikingly similar to this case. The defendant in *DiLillo* purchased from a Taft-Hartley welfare fund, a resort owned by the fund. The purchase agreement called for a direct payment to the fund of 15 million dollars. An additional payment valued at 3.5 million dollars was to be applied to interim operating expenses of the resort and the repayment of certain debts incurred by the fund in the construction of the resort. The 3.5 million was to be obtained by the defendant through a first mortgage of the resort. It was contemplated by the parties that not all of the proceeds of the mortgage would probably be needed to pay all the stipulated expenses and debts. Any remaining money was to be retained by the defendant. When the mortgage was obtained, however, the funds were disposed of in a manner inconsistent with the contract.

Prosecution ensued from the misapplication of these funds. Defendant was found guilty of violating §664 through the embezzlement of the mortgage proceeds. The Court of Appeals reversed. The 3.5 million never

became an asset of the fund. Under the contract, the fund had no right to the proceeds of the mortgage or to any money remaining after payment of all expenses. Since the fund had no rights in the proceeds of the mortgage, when these funds were applied in a manner inconsistent with the contract, §664 was not violated. The defendant here had no employment with the union or any of its funds. This was, therefore, a breach of contract and nothing more.

The instant case is factually distinguishable. Sorbara, as a representative of the Fund, negotiated a compromise which resulted in an oral modification of the contract. VSA offered to pay to the Fund the $9,232.29 paid to Homitz. Instead of accepting this money for the fund, Sorbara directed VSA to make the payment to Homitz. When VSA offered the money to the Fund it became a fund asset. When Sorbara directed its payment to Homitz, §664 was violated.

DiLillo is even more fundamentally different than this action, however. *DiLillo* involves a breach of contract in which designated funds were misapplied. This action, however, presents a much more egregious breach; a breach of fiduciary duty. Sorbara, as a trustee of the Fund, chose not to accept the money offered to the Fund to compromise a claim of the Fund. When he did so, he did not deal fairly with the trust assets. His disposition of trust assets, as a trustee, in a manner not consistent with the best interests of the Fund is embezzlement and more properly the subject of prosecution than the breach of a contract with a fund by a party having no fiduciary relation to the fund, as in *DiLillo*. Defendants' argument must, therefore, be rejected.

II

Defendants' motion for a new trial is based in part on the admission of testimony regarding labor disputes between Local 1407 and its office workers, represented by defendant Homitz. The defendants urge that this testimony was irrelevant and prejudicial. This assertion is incorrect.

First, the evidence is highly relevant. The Government used the evidence of a labor dispute to prove that Sorbara had a motive to pay Homitz, that motive being the obtaining of favorable treatment by Homitz during the conflict between the office workers represented by Homitz and Local 1407. Defendants argued that the strike by the office workers was legal, thus Homitz could do, and in fact, did nothing to aid Sorbara in dealing with the strike. Even assuming Homitz acted fully within the law, this argument is not persuasive. It was not necessary for Homitz to violate labor laws in order to aid Sorbara during the strike. Defendants, for example, urge that Homitz was not responsible for obtaining strike benefits from the International, thus when these benefits were not obtained, the jury should not be permitted to conclude that Homitz was in any way influenced to prevent the granting of strike benefits. This argument ignores, however, the fact that the jury could find that Homitz did not intervene in behalf of his membership. Whether he had a direct duty to intervene is irrelevant. The jury was entitled to find that he could and should have intervened, even without a duty to do so, and his forbearance could have been purchased. This conclusion by the jury is not inconsistent with a finding (as defendants urge is the case) that Homitz violated no labor law in his handling of

the strike. It is clear that in this matter and in others, Homitz could have aided Sorbara without violating the law. This aid could have been purchased. The evidence regarding the strike is thus relevant.

Second, in light of the relevance of the evidence, any prejudice which resulted from it is outweighed. The prejudice asserted arose out of the characterization of the strike by the Assistant United States Attorney as an "illegal" strike. Technically, it was an illegal strike. The notices required by §8(d) of the Labor Management Relations Act were not timely sent, thus the characterization was not incorrect. More important, however, no crime was imputed to Homitz through characterizing the strike as illegal. As a result, the prejudice arising out of the characterization was minimal.

In addition to objecting to evidence regarding the strike, defendants object to evidence introduced of debts owed by Homitz to Local 1407's credit union.[2] Since these debts were not paid after Homitz received the VSA payment, defendants argue that repayment of these debts could not be a motive for the payment by Sorbara to Homitz. This argument demands too much, however. The debts show that Homitz needed money. That these debts were not paid does not rebut this fact. The jury could consider evidence that the debts were not paid subsequent to the VSA payment and make their own conclusions concerning motive. This

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2. Sorbara was a member of the Board of Directors of the Credit Union which Local 1407 had established. We allowed evidence that Homitz had borrowed money from the credit union prior to the compromise with VSA.

is enough to counteract the prejudice (if any) arising out of the evidence of debts.

Since no error is perceived, a new trial is unjustified.

An appropriate order follows.

BARRON P. MCCUNE
United States District Judge

Dated: April 11, 1978.
cc: Counsel of record.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78-1563

UNITED STATES OF AMERICA
v.
JOSEPH A. SORBARA,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 77-00159-01

Argued November 13, 1978
Before
ROSENN, GARTH, and HIGGINBOTHAM *Circuit Judges*

Judgment Order

Appellant, Joseph A. Sorbara, was convicted by a jury of embezzlement, in violation of 18 U.S.C. §§ 2, 371, 664. On appeal, appellant raises the following contentions:

(1) That the evidence is not sufficient to sustain the jury verdict;

(2) that the district court abused its discretion admitting evidence of a loan of Homitz's and his debt to Local 1407's credit union and evidence of a labor dispute between Local 1407

and Local 33 in order to prove Sorbara's motive;

(3) That the district court erred in instructing the jury as to the appropriate standard by which to evaluate reputation evidence concerning those traits involved in the crimes alleged.

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court:

MAX ROSENN
Circuit Judge

Attest:

THOMAS F. QUINN,
Clerk

Dated: November 20, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78-1567

UNITED STATES OF AMERICA
v.
THEODORE PETER HOMITZ,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Crim, No. 77-00159-02

Argued November 13, 1978
Before
ROSENN, GARTH, and HIGGINBOTHAM *Circuit Judges*

Judgment Order

Appellant, Theodore Peter Homitz, was convicted by a jury of embezzlement, in violation of 18 U.S.C. §§ 2, 371, 664. On appeal, appellant raises the following contentions:

(1) That the evidence is not sufficient to sustain the jury verdict;

(2) that the district court abused its discretion admitting evidence of a loan of appellant Homitz and his debt to Local 1407's credit union and evidence of a labor dispute between Local 1407 and Local 33 in order to prove Sorbara's motive;

Appendix B.

(3) That the district court erred in instructing the jury as to the appropriate standard by which to evaluate reputation evidence concerning those traits involved in the crimes alleged.

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court:

MAX ROSENN
Circuit Judge

Attest:

THOMAS F. QUINN,
Clerk

Dated: November 20, 1978

Appendix C.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1563 and 78-1567

UNITED STATES OF AMERICA
v.
JOSEPH A. SORBARA,
Appellant in 78-1563
T. PETER HOMITZ,
Appellant in 78-1567

Sur Petition for Rehearing

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

MAX ROSENN
Judge

Dated: December 12, 1978